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IN THE

# SUPREME COURT OF THE UNITED STATES

No. 762

OCTOBER TERM, 1940

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JOHN H. McGLOON,
*Petitioner,*
*against*

THE UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

February 10, 1941.

FRED A. IRONSIDE, JR.,
*Solicitor and Counsel for Petitioner.*

Appeal Printing Co., Inc., 130 Cedar St., New York

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# SUPREME COURT OF THE UNITED STATES

No.

OCTOBER TERM, 1940

JOHN H. McGLOON,
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*against*

THE UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, John H. McGloon, respectfully represents to the Court:

I. That on the 15th day of January, 1941, the Circuit Court of Appeals unanimously affirmed a judgment of conviction in a criminal cause against petitioner, which had been entered in the District Court of the United States for the Southern District of New York, after a

trial before Honorable Grover M. Moscowitz, United States District Judge, and a jury (fols. 5-7, incl., p. 65, fol. 66).

II. The judgment was entered upon the Thirteenth Count of an indictment which contained fourteen counts. The indictment charged ten separate violations of the Mail Fraud Statute (18 U.S.C.A. Sec. 338), under separate counts; a conspiracy to violate the Mail Fraud Statute and the Securities Exchange Act of 1934 (18 U.S.C.A. Sec. 88) under one count; and three separate violations of the Securities Exchange Act of 1934 (15 U.S.C.A. Secs. 78m and 78ff), under three counts (fols. 8-96, incl.). Petitioner was acquitted by the jury on all counts of the indictment except Count Thirteenth, upon which count the jury returned a verdict of guilty (fols. 6-7, 110).

The count of the indictment upon which the judgment of conviction was entered charged that petitioner and others, named and unnamed, on or about April 29, 1938, unlawfully did make and cause to be made, false and misleading statements with respect to material facts in certain applications, documents and reports filed and required to be filed with the New York Stock Exchange by the Securities Exchange Act of 1934 and in accordance with the rules and regulations prescribed by the Securities and Exchange Commission (fols. 67-70, incl.).

III. Petitioner was sentenced under the judgment to imprisonment for a term of one year and one day, and to pay a fine of Five Thousand Dollars ($5,000), petitioner to stand committed until the fine is paid (fol. 7).

IV. Under the assignment of errors filed below on behalf of petitioner, argument was presented in the Cir-

cuit Court of Appeals, both oral and written, urging that the allegations of the indictment are insufficient to charge an offense and are insufficient to support the judgment of conviction thereon, for the following reasons:

(1) The portion of the penal statute under which the indictment was drawn is unconstitutional in that it sets up no ascertainable and immutable standard of guilt.

(2) The facts alleged in the indictment are insufficient to charge the commission of a crime for the reasons that: (a) The indictment fails to charge an offense by failing to allege that petitioner wilfully and knowingly made any statement in any application, report or document required to be filed, which statement was false or misleading with respect to any material fact. (b) The indictment fails to allege an essential element of the offense; to wit, that petitioner knew the statements charged therein were false and made them with knowledge of their falsity. (c) The indictment fails to allege an essential element of the offense; to wit, that petitioner knew the applications, documents and reports were instruments required to be filed by the Securities Exchange Act. (d) The indictment is insufficient in that it pleads only conclusions and not ultimate facts constituting an offense, and is indefinite, uncertain and ambiguous.

**Jurisdiction**

The decision affirming the judgment of conviction was made on the 30th day of December, 1940, and the judgment of the Circuit Court of Appeals thereon was entered on the 15th day of January, 1941 (pp. 65-66, fols. 65-66). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (28

U.S.C.A. Sec. 347(a)), and under the Rules of Practice and Procedure in Criminal Cases promulgated May 7, 1934.

The Circuit Court of Appeals affirmed judgment of conviction, per curiam, without opinion (p. 65, fol. 65).

### Questions Presented

V. The following questions are presented for review by this Court:

1. Whether that portion of the penal statute, under which the Thirteenth Count of the indictment was drawn, is void and unconstitutional for failure to set up an ascertainable and immutable standard of guilt.

2. Whether the facts alleged in the indictment (Thirteenth Count) are sufficient in law to charge an offense against the United States, and sufficient to support the judgment of conviction thereon.

### As to the First Question Presented

The charges set forth in the Thirteenth Count of the indictment are based upon two provisions of the Securities Exchange Act of 1934. One provides for the filing of periodical and other reports in accordance with the rules and regulations of the Securities and Exchange Commission (15 U.S.C.A. Sec. 78m). The other provides for the punishment of any person who knowingly and willfully makes a material false statement in any application, report or document required to be filed by statute or regulations of the Securities and Exchange Commission (15 U.S.C.A. Sec. 78ff).

The indictment, however, fails to allege facts bringing the petitioner within any of the provisions of the statute.

No facts are alleged showing that he was an issuer of or dealer in securities, and it does not appear that he was a person subject to the provisions of Section 78m and required to file information, documents or reports in accordance with rules of the Commission. He is not described as a member of an exchange or a broker. The pleading fails to disclose that he is a person subject to the provisions of the Securities Exchange Act. He cannot, therefore, be subject to the penal provisions of the Act. Such statute can only be considered to refer to persons who are issuers of securities, exchanges, brokers, dealers or persons engaged in the securities business. The petitioner is nowhere identified in the indictment as a person required to comply with the Act.

If amenable at all to the Act, petitioner is made so by the provision empowering the Securities and Exchange Commission to promulgate rules and regulations in respect of its enforcement (15 U.S.C.A. Sec. 78w). Thus, the indictment charges petitioner with making certain false and misleading statements with respect to material facts in unspecified applications, documents and reports required to be filed with the New York Stock Exchange by the Securities Exchange Act and in accordance with the rules and regulations prescribed by the Commission. However, it does not appear in the indictment that the petitioner is a person who is subject to such rules and regulations.

An examination of the statute shows, as will be developed more fully in the supporting brief herein, that the delegation by Congress to the Securities and Exchange Commission of the power to make rules and regulations, the violation of which shall constitute and be punished as an offense, is not circumscribed by those

definite standards and limitations necessary to validate a delegation of such power to an administrative agency of the Government, and is therefore unconstitutional.

**As to the Second Question Presented**

The indictment seeks to bring the charge within the provisions of the penal section of the Securities Exchange Act of 1934 (15 U.S.C.A. Sec. 78ff), which is set forth in the appendix *infra* at page 23.

This statute condemns the making of a statement *in* any application, report or document required to be filed which statement was false or misleading with respect to any material fact.

The indictment, however, attempts to charge as a crime the alleged making of "false and misleading statements with respect to material facts in certain applications, documents and reports filed * * * with the New York Stock Exchange * * *". No charge anywhere appears that the petitioner made a statement *in* any application, report or document. The charge, if anything, is that McGloon made a statement "with respect to material facts" in some unspecified writing. In other words, he is charged only with having made false statements about something that was in the applications, reports and documents. He is not charged with making false statements *in* the writings themselves. The facts alleged are consistent with innocence. The elements of the crime are therefore not alleged.

**Reasons for Granting the Writ**

VI. Your petitioner respectfully urges that, as shown above and as will be more fully urged in the brief accompanying this petition, the Circuit Court of Appeals in

this cause has rendered a decision in conflict with applicable decisions of this Court; has decided an important question of constitutional law in conflict with the weight of authority; and that the judgment presented for review has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

WHEREFORE, petitioner prays that a writ of certiorari may issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and all proceedings had herein; and that the order of the United States Circuit Court of Appeals affirming the judgment in this cause may be reversed, and that petitioner may have such other and further relief in the premises as this Court may deem appropriate.

Dated, New York, N. Y., February 10, 1941.

JOHN H. MCGLOON,
Petitioner,

By FRED A. IRONSIDE, JR.,
*Solicitor and Counsel for Petitioner.*

**Affidavit of John H. McGloon.**

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
STATE OF NEW YORK, COUNTY OF NEW YORK.

JOHN H. McGLOON,
*Petitioner,*
*against*
THE UNITED STATES OF AMERICA,
*Respondent.*

State of New York }
County of New York } ss.:

JOHN H. McGLOON, being duly sworn, says:

I am the petitioner herein. I have read the foregoing petition by me subscribed and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

JOHN H. McGLOON.

Sworn to before me this 10th }
day of February, 1941. }

MARGARET M. FOLEY,
Notary Public,
Bronx County.

State of New York }
County of New York } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

FRED A. IRONSIDE, JR.